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LETTER DATED 21 DECEMBER 1992 FROM THE PRESIDENT OF THE GOVERNING COUNCIL OF THE UNITED NATIONS COMPENSATION COMMISSION ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL

I have the honour to transmit herewith, for the attention of the Security Council, the following information on the eighth session of the Governing Council, held from 14 to 18 December 1992.

At its 31st plenary meeting held on 18 December, the Governing Council adopted the following decisions:

(a) Decision No. 14 on the establishment of the United Nations Compensation Commission Committee on Administrative Matters (S/AC.26/1992/14);

(b) Decision No. 15 on compensation for business losses resulting from Iraq's unlawful invasion and occupation of Kuwait where the trade embargo and related measures were also a cause (S/AC.26/1992/15);

(c) Decision No. 16 on awards of interest (S/AC.26/1992/16).

The texts of the decisions are enclosed herewith.

With respect to item 9 of the agenda (Priority of payment of claims), the Council agreed on the text of a declaration that was read out by the President at the 31st plenary meeting of the Council. The text of the declaration is also attached.

Representatives of Kuwait and Iraq were authorized to address the Council at its 30th plenary meeting, held on 14 December 1992 in accordance with paragraph 5 of the Guidelines for the Conduct of the Work of the Governing Council.

The Executive Secretary informed the Governing Council, inter alia, of the receipt by the secretariat, as of 14 December 1992, of more than 380,000 claims in categories A, B and C, submitted through Governments.

The next session of the Governing Council will take place from 29 March to 2 April 1993.

(Signed) Alex REYN
President
Governing Council
United Nations Compensation Commission

Annex I

DECISION NO. 14

Adopted by the Governing Council of the United Nations Compensation Commission during its eighth session, at its 31st plenary meeting, held from 14 to 18 November 1992*

Establishment of the United Nations Compensation Commission Committee on Administrative Matters

The Governing Council decides to establish a Governing Council Committee called "the United Nations Compensation Commission Committee on Administrative Matters" (CAM). CAM will be composed of Geneva representatives (or their designees) of interested States members of the Governing Council. The President of the Governing Council or his designee will be Chairman of CAM. CAM will meet informally whenever deemed appropriate by the Chairman or by the Executive Secretary. CAM will review and provide guidance on major administrative and budgetary matters presented to it by the Executive Secretary, including the annual administrative budget. The Governing Council retains authority to make all decisions concerning the payment of claims.

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* Previsouly issued under the symbol S/AC.26/1992/14.

Annex II

DECISION NO. 15

Adopted by the Governing Council of the United Nations Compensation Commission during its eighth session, at its 31st plenary meeting, held from 14 to 18 November 1992*

Compensation for business losses resulting from Iraq's unlawful invasion and occupation of Kuwait where the trade embargo and related measures were also a cause

1. Paragraph 16 of Security Council resolution 687 (1991) reaffirms "that Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait".

2. In paragraph 6 of its decision No. 9 on propositions and conclusions on compensation for business losses, hereinafter referred to as decision No. 9, the Governing Counsel set out guidelines for awarding compensation for business losses caused by Iraq's unlawful invasion and occupation of Kuwait where the trade embargo and related measures were also a cause, and undertook to provide further guidance on the matter.

3. The two essential elements of admissible losses are (a) that such losses must be the result of Iraq's unlawful invasion and occupation of Kuwait and (b) that the causal link must be direct. Although the United Nations trade embargo was imposed in response to Iraq's invasion and occupation of Kuwait, losses suffered solely as a result of that embargo are not considered eligible for compensation because the causal link between the invasion and the loss is not sufficiently direct.

4. The terms of contracts, and transactions that have been part of a business practice or course of dealing, as well as the relevant circumstances will need to be examined by Commissioners to determine whether related claims fall within the scope of the Compensation Commission.

5. In all cases, Commissioners will require evidence that claims fall within the criteria of direct loss as set out in paragraph 16 of resolution 687 (1991) in order for them to be eligible for compensation by the

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* Previously issued under the symbol S/AC.26/1992/15.

Compensation Fund. It will not be enough for claimants to argue that losses were due to the chaotic economic situation following Iraq's unlawful invasion and occupation of Kuwait. There will be a need for detailed factual descriptions of the circumstances of the claimed loss, damage or injury.

6. In its decisions Nos. 1 and 7, the Governing Council decided that compensation payments are available with respect to any direct loss suffered as a result of:

(a) Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;

(b) Departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period;

(c) Actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;

(d) The breakdown of civil order in Kuwait or Iraq during that period; or

(e) Hostage-taking or other illegal detention.

These guidelines are not intended to be exhaustive. There will be other situations where evidence can be produced showing that claims are for direct loss, damage or injury as a result of Iraq's unlawful invasion and occupation of Kuwait.

7. Commissioners will wish to apply relevant valuation methods to different categories of loss. Paragraph 15 of decision No. 9 shows various valuation methods for tangible assets depending on the type of asset and the circumstances of the case. Paragraph 18 of decision No. 9 shows various valuation methods for losses relating to income-producing properties. When compensation for losses of future earnings and profits is assessed, documentary evidence such as a contract should be presented wherever possible, and where no contract existed, other evidence should be submitted to enable losses of future earnings to be calculated with reasonable certainty. Such evidence should wherever possible be broadly equivalent to contracts that were in existence, or prove that such contracts or projections of future trading patterns existed. Paragraph 17 of decision No. 9 states that, in the case of a business which has been, or could have been, rebuilt and resumed, compensation would be awarded for the loss from cessation of trading to the time when trading was, or could have been, resumed. In the case of a business or course of trading which it was not possible to resume, the Commissioners would need to calculate a time-limit for compensation for future earnings and profits, taking into account the claimant's duty to mitigate the loss wherever possible.

8. This paper does not address the issues arising from claimants' attempts to avail themselves of particular sources of recovery, such as to claim against the other party to a contract.

Commentary on paragraph 6 of decision No. 9

9. The first four sentences of paragraph 6 of decision No. 9 are now considered in turn. The object is to provide further guidance for Commissioners when they assess claims in respect of business losses of individuals, corporations and other entities. The guidance is also intended to help claimants in presenting their claims. It will be for Commissioners to draw on the principles in this guidance when making their judgements on actual cases which will stand or fall according to their specific factual and legal situations.

> "The trade embargo and related measures, and the economic situation caused thereby, will not be accepted as the basis for compensation."

(a) The practical effect of this statement is that any loss, damage, or injury resulting solely from the trade embargo and related measures, and the economic situation caused thereby, is not eligible for compensation. The trade embargo and related measures are the prohibitions in Security Council resolultion 661 (1990) and relevant subsequent resolutions and the measures taken by States in anticipation thereof and pursuant thereto, such as the freezing of assets by Governments. The trade embargo against Kuwait was applied from 6 August 1990 to 3 April 1991 during Iraq's occupation of Kuwait. The trade embargo against Iraq was also applied from 6 August 1990 and is still in force;

(b) "The economic situation caused thereby" is a broader concept. The trade embargo and related measures had wider economic effects, both on international trade and on economic activity within Kuwait and Iraq. For example, the world price of oil was temporarily higher than it otherwise would have been and, in addition, countries which previously imported oil from Iraq and Kuwait had to find other sources of supply, with effects on transport and transit services and on refinery operating costs. Companies which might have expected to export goods or services to Kuwait or Iraq will have had to look for alternative markets, with potentially depressing effects both on their profits and those of their suppliers.

> "Compensation will be provided to the extent that Iraq's unlawful invasion and occupation of Kuwait constituted a cause of direct loss, damage or injury which is separate and distinct from the trade embargo and related measures."

(a) The practical effect of this statement is that compensation will be provided, if and to the extent that loss, damage or injury resulting directly from Iraq's unlawful invasion and occupation of Kuwait was actually suffered and would have been suffered irrespective of whether the trade embargo and related measures had been in force;

(b) Particularly in the case of larger and more complex claims, the Commissioners may decide that some losses listed in a claim are a direct result of Iraq's unlawful invasion and occupation of Kuwait and should be

compensated and that other losses listed in the same claim resulted solely from the embargo and related measures and are therefore ineligible for compensation. In this situation partial compensation would in principle be payable.

> "Where the full extent of the loss, damage or injury arose as a direct result of Iraq's unlawful invasion and occupation of Kuwait, it should be compensated notwithstanding the fact that it may also be attributable to the trade embargo and related measures."

(a) This is intended to show that the full extent of a loss, damage, or injury may be attributed both to Iraq's unlawful invasion and occupation of Kuwait and to the trade embargo and related measures; they are parallel causes;

(b) Some cases of parallel cause loss may prove difficult to assess. There would be instances at the time of the invasion and embargo when ships diverted because it was unsafe to enter Kuwaiti or Iraqi ports. The Commissioners will need to examine closely the alleged cause of all losses after 6 August 1990 in order to determine the extent to which the loss arose as a direct result of the Iraqi invasion and occupation of Kuwait, and is therefore compensable, even though it could also be considered to have resulted from the embargo and related measures. If the Commissioners decide that a loss had such a parallel cause, full compensation would in principle be awarded.

> "The total amount of compensable losses will be reduced to the extent that those losses could reasonably have been avoided."

(a) The duty to mitigate applies to all claims and not simply to those under discussion in paragraph 6 of decision No. 9. The subject of mitigation is referred to in paragraphs 10, 17 and 19 of decision No. 9.

10. The guidance contained in the present decision applies to all types of business losses, including losses relating to contracts, transactions that have been part of a business practice or course of dealing, tangible assets and income-producing properties.

Annex III

DECISION NO. 16

Adopted by the Governing Council of the United Nations Compensation Commission during its eighth session, at its 31st plenary meeting, held from 14 to 18 November 1992*

Awards of interest

The Governing Council decides that:

1. Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.

2. The methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time.

3. Interest will be paid after the principal amount of awards.

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* Previously issued under the symbol S/AC.26/1991/16.

Annex IV

Declaration by the President of the Governing Council at the 31st plenary meeting

Working Group A had a useful and informative discussion of agenda item 9, Priority of payment of claims. The Group reaffirmed the principle that the clear-cut priority accorded to claimants in categories A, B and C by the Commission in decision No. 1 should be applied in every stage of processing, including the payment stage.

Working Group A confirmed its intention to develop a rational and effective system for the payment of claims as a matter of high priority and, in any case, before the Compensation Fund receives amounts sufficient to begin to pay claims.

In order to gain the necessary information for such a system, several questions were asked to States and to the secretariat.

Working Group A requests that the secretariat be asked to collect and provide this information, in so far as it may be available, and to make it available to the Governing Council at its ninth session.